



Glenn A. Youngkin
Governor

G. Bryan Slater
Secretary of Labor

COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

July 8, 2024

Kishore S. Thota
Director

Brian P. Wolford
Chief Deputy Director

Complainant: Constance Frant
Association: Barcroft Mews Homeowners Association, Inc.
File Number: 2024-2518

DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on May 17, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Constance Frant ("Complainant"). The Complainant initially submitted a complaint to the Barcroft Mews Homeowners Association Board of Directors ("Board") on or about February 15, 2024, and the Board issued its final decision on or about April 29, 2024. Therefore, the NFAD was timely filed and within the jurisdiction of this Office, which has been designated to review final adverse decisions and determine if the decisions conflict with laws or regulations governing common interest communities.

Issues to be Decided.

In the Complaint, the Complainant raises two issues: (1) Failure to notify membership about changes in the resale of their homes; and (2) Failure to regularly update Association website. As explained below, this Office finds, in both issues, that the evidence before it is insufficient to conclude that the Board fails to comply with the applicable law or regulation.

Factual Summary

Complainant's Contentions

The Complainant states that the Association Board of Directors failed to alert membership of the changes in the Resale Disclosure Act. The Complainant cited the sale of three homes since the Resale Disclosure Act came into effect on July 1, 2023, as evidence to support the assertion that the Board knew about the Resale Act but failed to comply with it.

(P. 1 of the Complaint's Original Complaint, dated February 15, 2024, ("Original Complaint").

Furthermore, the Complainant alleges that the Board failed to provide, on its website, board policies which are required to be included in the resale certificate. The Complainant states that the Association's policies and records are not updated. (P. 1 of the Original Complaint).

Board's Responses

The Board, in its response, states that the Board is not required to notify membership of changes in the pricing set by DPOR, and that the relevant statute only requires that the information be made available at time of order. The Board also states that the aforementioned information is available on the Landmarc (management company) website as well as the Association's website. (P. 1 of the Notice of Final Board Decision, dated April 29, 2024).

As to the allegation of failure to update, the Board states that changes, about Resale Certificate, are updated on the Landmarc website as one of the duties performed on behalf of the Board by the management company, Landmarc. The Board acknowledges that since the website is not the official record-keeping mechanism, the website may not be up to date at a certain time. The Board points out that any owner in good standing has the right to request documents from management, which satisfies its obligation to make the Association books and record reasonably available to members. (P. 1 of the Notice of Final Board Decision, dated April 29, 2024).

Authority

In accordance with its regulations, the Common Interest Community Ombudsman (CICO), as designee of the Agency Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18 Va. Admin. Code ("VAC") § 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §54.1-2354.4 of the Code of Virginia of 1950, as amended ("Va. Code") and the Common Interest Community Ombudsman regulations ("Regulations"). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations."

Under the Regulations, "applicable laws and regulations" pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure, and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act.

The only documents that will be considered when reviewing a NFAD, in accordance with Regulation 18 VAC 48-70-90, are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be

reviewed or considered. Further, this Determination is final and not subject to further review or appeal pursuant to Va. Code § 54.1-2354.4(C).

If within 365 days of issuing a determination that an adverse decision is in conflict with laws or regulations governing common interest communities we receive a subsequent NFAD for the same violation, the matter will be referred to the Common Interest Community Board to take action in accordance with Va. Code §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

Determination

As described more fully below, the Office has determined, upon a review of the materials submitted with the NFAD, that in both issues, that the evidence before it is insufficient to conclude that the Board fails to comply with the applicable law or regulation.

1. Board failed to alert membership of the changes in the Resale Disclosure Act.

The applicable law, §55.1-2308 of Code of Virginia, states in pertinent part:

Unless exempt pursuant to § 55.1.2317, any contract for the resale of a unit in a common interest community shall disclose (i) that the unit is located in a common interest community; (ii) that the *seller* is required to obtain from the association a resale certificate and provide it to the purchaser; (iii) the purchaser's right to cancel the contract pursuant to §55.1.2312; (iv) that the *purchaser* may request an updated resale certificate pursuant to §55.1-2311; and (v) that the purchaser's right to receive the resale certificate and the right to cancel the contract are waived conclusively if not exercised before settlement. Va. Code §55.1-2308.

The *seller* shall be required to obtain the resale certificate from the association and provide such resale certificate to the *purchaser*. Va. Code §55.1-2309(A).

If a resale certificate was issued more than 30 days but less than 12 months before settlement, the *seller* or the *purchaser*, upon proof of being the contract purchaser of the unit, may request an update resale certificate. The updated resale certificate shall be delivered to the person requesting it, or as such person may direct, in the format requested. The updated resale certificate shall be delivered within 10 days after the written request. Va. Code §55.1-2311 (Emphasis added).

Pursuant to the above applicable law, only the seller and the purchaser have the right to obtain the resale certificate and/or updated resale certificate under Va. Code §§55.1-2307 *et seq.* In this case, the Complainant states that the Association Board of Directors failed to comply with the Virginia Disclosure Resale Act because it has not notified the members of the changes in the resale of their homes. The Complainant listed three homes that have been sold since July 1, 2023, effective date of the Act as proof that the Board knew but failed give notice. (P.1 of Original Complaint).

Nowhere did the Complainant mention that he was a purchaser or seller, as a result, the Complainant is not entitled to the resale certificate or the information therein under this Statutes. If the Complainant wants access to the Association books and records, the Complainant has the right to make a request pursuant to Va. Code §55.1-1815, which states in pertinent parts:

The association shall keep detailed records of receipts and expenditures affecting the operation and administration of the association. All financial books and records shall be kept in accordance with the generally accepted accounting practices. Subject to limited exceptions, all books and records kept by or on behalf of the association are available for examination and copying by a member in good standing or his authorized agent. Va. Code §55.1-1815(A), (B).

There is no evidence on record showing that the Complainant made a request under the applicable law and was denied access to requested information, therefore, this Office finds that the Board did not violate the Resale Disclosure Act.

2. Failure to regularly update Association website.

Additionally, the Complainant asserts that the Board policies which are required to be part of the resale certificate are not on the Association website, and that policies and records are not being updated regularly. (P.1 of Original Complaint). The Board counters that the changes regarding resale certificate are updated on Landmarc, the management company's website. The Board acknowledges that since the website is not the official record-keeping mechanism, the information on the website may not be current at a certain time. The Board points out that any owner in good standing has the right to request documents from management, which satisfies its obligation to make the Association books and record reasonably available to members. (P. 1 of the Notice of Final Board Decision, dated April 29, 2024).

The Office agrees with the Board that if Complainant needs information, books and/or records of the Association, the Complainant should make the request pursuant to §55.1-1815(A) of the Virginia Code, 1950, as amended. There is no evidence to show how often the Board and/or its management company update the websites or the information therein, and as such, this Office cannot conclude whether the Board is delinquent in updating its website. It is not unreasonable if the Association website lacks the type of information the Complainant may be seeking because the website should not serve as a business record repository, and it is also understandable that updating data on the website may not be instantaneous. Notwithstanding, this Office suggests that the Board (1) makes sure its website contain reasonably updated and current information relating to the Association; (2) provides links to all the applicable laws, policies, procedures, and regulations; and (3) provides reasonable description on how to navigate between its website and that of its management company, Landmarc; and if possible, make its websites user-friendly.

Conclusion

Based upon the information in the record, including the original complaint, its accompanying documents, as well as the NFAD, this Office finds that the Board did not violate the Virginia Resale Disclosure Act. Va. Code § 55.1-2307 *et seq.* Furthermore, there is insufficient evidence to conclude that the Board is delinquent in providing updates in its website.

Decision

This Office, therefore, recommend that the Complainant requests information or records under the proper Statutes. Also, it will be more beneficial if the Board make certain that its website is updated within reasonable intervals to ensure the members have access to current and updated information. If the Complainant is dissatisfied with this determination, or part thereof, the Complainant could seek remedies in civil or criminal court.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Justina Ehiawaguan, Esquire
CIC Ombudsman

cc: Board of Directors
Barcroft Mews Homeowners Association, Inc.